IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDCITION
CRIMINAL APPEAL NO.171 OF 1990

Khandu Jairam Shelke ... Appellant (Org.Accd.No.1)

Versus

The State of Maharashtra ... Respondent (Org. Complainant)

Smt. V.V. Thorat Advocate for the Appellant
Shri P.S. Hingorani APP for the State

CORAM : D.G. DESHPANDE, & S.R. SATHE,JJ.
DATED : 23rd FEBRUARY,2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The appellant-original accused No.1 in Sessions Case No.137 of 1989 has preferred this appeal against the judgement and order passed by the 4th Additional Sessions Judge, Nashik whereby the accused No.1 was convicted for the offence punishable under section 302 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs. 250/- in default to suffer R.I. for 3 months.

2. The brief facts giving rise to this appeal are as under :-

Deceased Muralidhar Shelke and the father of accused Nos. 1 and 2 namely Jairam Shelke were the real

brothers. Both of them were residing separately at village Kalkhode. There was some dispute between them on account of agricultural land. Few months prior to the incident dated 18/07/1989 deceased Muralidhar Shelke had exchanged his land adm. about 15 R. to Karbhari Bala Shelke. The brother of deceased Jairam and his sons i.e. accused Nos. 1 and 2 in fact wanted to take the said land. Hence on that ground some quarrel took place and the present accused No.1 and his brother Valmik and their father Jairam had threatened the complainant Balu Muralidhar Shelke and his brother but at that time, they had not lodged any complaint.

3. On 18/07/1989, at about 3.00 pm complainant Balu Muralidhar Shelke had gone to his field alongwith his father deceased Muralidhar. They were carrying on sowing operation in their field with the help of Pabar (Sowing machine). At about 6.00 pm, the accused No.1 Khandu and his brother Valmik (original accused No.2) and the wife of Khandu namely Meerabai(accused No.3) went to the said field and told the complainant and his father that they should not carry on sowing operation in the said field. They also told them that they have no right to do so as the land is not owned by them. On that ground, the original accused Nos. 1 to 3 started

giving abuses to Muralidhar. Not only that but the accused No.1 Khandu lifted the complainant's father Muralidhar and fall him down and then assaulted him with wooden log on the chest and stomach of Muralidhar. When complainant Balu tried to intervene, brother of accused No.1 namely Valmik and wife of accused No.1 assaulted Balu. As result of the beating received at the hands of accused No.1 Muralidhar sustained injury and was lying on the ground. The complainant Balu therefore rushed to the house of Sakhubai Shelke which was near from the place of incident and requested her to provide her cart as he wanted to take his father to dispensary. The complainant Balu accordingly after receipt of the cart took his father Muralidhar first to the house of Sakhubai, gave his father some water for drinking and then took the bullock-cart to their village. On his way, one Bajirao Shirsat met him so the complainant also took him alongwith him. The complainant took the bullock-cart to Maruti temple and then immediately went to the house of Police Patil Ashok Shelke and informed him about the incident. Police Patil then reached to the temple and then they took injured Muralidhar to the primary health center of village Kazi Sangvi. Doctor on duty provided some preliminary medical help to Muralidhar and advised the

complainant to take him to the hospital at Chandwad. Accordingly, the complainant took the injured Muralidhar to the hospital at Chandwad. He then went to the Police Station and lodged complaint. The Police registered the crime at C.R. No. 81 of 1989 against the accused for the offences punishable under sections 323, 441, 447, 504, 506 of IPC. Thereafter at about 11.30 pm Police received the information that Muralidhar succumbed to the injuries. The Police therefore registered offence under section 302 of IPC.

4. On the next date i.e. on 19/07/1989 Police drew the inquest panchanama and sent the dead body for postmortem. Police drew the panchanama of place of offence and recorded statement of various witnesses and arrested the accused.

5. After completion of the investigation, Police submitted charge-sheet against the accused for the offences punishable under sections 302, 323, 441, 447, 504, 506 of IPC in the Court of JMFC, Chandwad.

6. Finding that accused were charge-sheeted for the offence which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to the

Court of Sessions, Nashik.

7. The learned 4th Additional Sessions Judge, Nashik framed charge Exh-5 against the accused for the offences mentioned above. The charge was read over and explained to the accused. All the accused pleaded not guilty and claimed to be tried. From the suggestions put to the Prosecution witnesses it appears that the defence of the accused is of total denial. It is their contention that Muralidhar might have fallen on Pabar while carrying on sowing operation and as there was dispute between accused and deceased the complainant filed a false case against accused.

8. In order to prove the charge levelled against the accused the prosecution examined in all 10 witnesses consisting of PW-1 panch witness Daulat Dukare Exh-13, PW-2 complainant Balu Muralidhar Shelke Exh-15, PW-3 brother of complainant Rambhau Murlidhar Shelke Exh-18, PW-4 Sakhubai Shelke Exh-19, PW-5 Police Patil Ashok Shelke Exh-20, PW-6 Dr. Sham Chavan Exh-21, PW-7 Dr. Arun Sulakhe who carried postmortem Exh-23, Circle Inspector PW-8 Pundlik Rakibe Exh-27, Police Head Constable PW-9 Shivaji Shinde Exh-29 who recorded the complaint and Investigating Officer PSI PW-10

Tukaram Shelke Exh-31. Prosecution also produced inquest panchanama Exh-11, panchanama of place of offence Exh-14, FIR Exh-16, Postmortem Notes Exh-26 and rough sketch of the place of offence Exh-28.

9. After considering the prosecution evidence the learned trial Judge came to the conclusion that the prosecution had not adduced sufficient evidence to prove the charges levelled against accused Nos 2 and 3. However, the prosecution had brought sufficient evidence to prove the charge under section 302 against the accused No.1. The learned Trial Judge therefore acquitted accused Nos. 2 and 3 of all the charges and convicted accused No.1 for the offences punishable under section 302 of IPC and passed the above mentioned order of conviction and sentence.

10. Being aggrieved by the said order the accused No.1 has filed the present appeal. In this appeal before us Mrs. Thorat learned advocate for the accused has urged only 3 points. Firstly, she submitted that the learned Trial Judge has not properly appreciated the evidence on record and has wrongly relied upon the testimony of interested witness. Secondly, she canvassed before us that the alleged weapon used in the

commission of offence has not been produced by the prosecution nor the prosecution has proved exact place of offence. Lastly, she submitted that when on the same evidence the accused Nos. 2 and 3 have been acquitted by the learned Trial Judge the accused No.1 also should have been acquitted. She, therefore, submitted that the appeal be allowed and the order of conviction and sentence be set aside and the accused be acquitted. In the alternative, she submitted that if at all it is held that the accused No.1 assaulted deceased Muralidhar, still then he can not be convicted for the offence punishable under section 302 of IPC as the alleged incident has taken place on the spur of moment. There was no pre-meditation. Accused had no intention to cause such bodily injury to Muralidhar or to cause his death and as such, at the most, he can be convicted for the offence punishable under section 304 Part-II of IPC or some lessor offence. As against this, the learned APP submitted that deceased was of about 60 years age. The accused has assaulted him with log on his chest and stomach and as such he has been rightly convicted for the offence punishable under section 302 of IPC.

11. It is an admitted fact that deceased Muralidhar

and the father of present accused were real brothers. It is also not in dispute that both of them are having their separate lands at village Kalkhode. Not only that but admittedly there was some dispute between family of Muralidhar and the family of Jairam. Even accused has also stated in his statement under section 313 of Cr.P.C. that there was some boundary dispute between them. It is also not disputed that on 18/07/1989, Muralidhar was admitted in the hospital at Chandwad and he died as a result of the injury sustained by him.

12. The prosecution has produced postmortem report at Exh-26 and the same is duly proved by Dr. Sulakhe Exh-23 who carried out the autopsy. Doctor has stated that at the time of postmortem, he noticed the external injuries as mentioned in column No.17 and internal injuries as mentioned in column Nos. 18 and 20. The said injuries are as under :-

Column No.17 **:-**

1) Lacerated wound at the left leg at the upper end over the shin of tibia of the size about 2 cm x 1cm. Size No. r/o. being injury.

2) No any other injury seen.

Column No.18 **:-**

On palpation probable, rib fracture on right Side of 9th and 10th rib in the midclavicular line.

The injury mentioned is antemortem.

Column No.20. Thorax

(a) Wealls, ribs, cartilages	:	Rib fracture of 10th rib on right side in the midclavicular line, about 5 cm piece, separated from the costochondrol function.
(b) Pleura	:	Normal
(c) Larynx, Trachea and Bronchi.	:	Normal
(d) Right Lung	:	Congested (laden with blood)
(e) Left Lung	:	Congested (laden with blood)
(f) Pericardium	:	Normal
(g) Heart with weight	:	Heart size contracted right side found with blood left side is empty.
(h) Large Vessels	:	
(i) Additional remarks	:	

13. Doctor has opined that death of Muralidhar was due to Cordiorspiratory failure, due to shock, due to frightening or due to blow over the abdomen. Having regard to the injuries mentioned in the post mortem report one can safely say that the death of Muralidhar occurred as a result of the said injuries.

14. The main and the material question is whether the said injuries were caused at the hands of accused No.1 as alleged by the prosecution or whether the same were sustained by the deceased due to fall as contended

by the defence. It is true that Dr. Sulakhe has even admitted that such injury is possible due to fall. However, merely because Doctor has stated accordingly, we can not jump to the conclusion that benefit of such statement has to be given to the accused. When we find that there is positive reliable evidence on record to show that the injury in question was caused at the hands of accused No.1 and not due to fall of the deceased, no importance can be given to the statement of the Doctor that such particular injury is also possible due to fall.

15. The complainant Balu Muralidhar Shelke, son of the deceased Muralidhar Exh-15 has categorically stated that on the day of incident at about 6.00 pm when they were sowing their land with the help of Pabar the accused persons came there and they asked complainant and his father not to sow the said land and on that ground the accused started abusing and then accused No.1 Khandu lifted Muralidhar and threw him on the ground and then assaulted on his chest and stomach with 'Rumna' (one sort of wooden log) and when he tried to intervene he was also assaulted by the brother and wife of accused No.1. Much is made about the fact that prosecution has not produced any medical certificate to

show that complainant Bala had actually received any injury. It was also tried to be suggested that as there was dispute between the cousin brothers, Bala filed a false complaint. Firstly, it must be noted that even Bala has nowhere specifically stated that as a result of beating received at the hands of accused Nos. 2 and 3, he had sustained any serious injuries. When he found that his father was in fact beaten with 'Rumna' and was not in a position to move, naturally, he must not have given any importance to the beating received by him. So, having regard to all these facts, merely because there is no medical certificate in respect of the injuries of Bala, we can not jump to the conclusion that Bala was not present at the place of offence or that he has not seen the alleged incident. What is more to be noted is that it is not even suggested to Bala that on that day at the relevant time, deceased Muralidhar and Bala had not gone to their field. The evidence of complainant Bala is not at all shaken or shattered in the cross-examination. Nothing has been brought in his cross-examination which will point out any material omission or contradiction so as to discredit his testimony. On the contrary, we find that he is a natural witness and the entire subsequent conduct of Bala, the complainant is quite natural and

it in fact lends support to his version. We find that complaint has been lodged by him within about 3-4 hours. During the intervening period, he was busy in taking his father first to primary health center and then to Chandwad Hospital. So, one thing is certain that in the instant case, the complaint has been lodged promptly in which the complainant Balu has specifically stated about the incident and assault made by accused No.1 to deceased Muralidhar. There are various authoritative pronouncements in which it has been held that prompt lodged of the FIR lends support to the prosecution version. It in fact shows that complainant had no sufficient opportunity to prepare any concocted story. It is really very difficult to believe that within such short time the complainant who is a rustic person would hatch a plan and file a false case against his cousin brothers only with a view to take advantage of the fact that his father has sustained some injury. We are not at all inclined to accept the stand taken by the defence in this behalf. The evidence of complainant Balu Shelke is quite cogent and consistent. It is also supported by other evidence on record and as such the same is rightly accepted by the learned Trial Judge.

16. The prosecution witness No.4 Sakhubai Shelke

has admitted that on that day in the evening Balu had come to her and requested her to provide cart. According to Balu, he had told her about the entire incident but unfortunately witness Sakhubai has turned hostile and she has not supported the prosecution version in this behalf. However, we can not ignore the fact that in cross examination, she has admitted that Balu had told her that he wanted to take his father to hospital as his father has received beating. So, this admission also suggests that there is truth in the say of complainant Balu that he had told Sakhubai that his father has been assaulted.

17. The prosecution has also examined PW-3 brother of complainant Rambhau Murlidhar Shelke. He has also stated that when he received information about the incident, he went near Maruti Temple and met his father. At that time, his father told him that Khandu i.e. present accused assaulted him. It was argued on behalf of defence that when according to Balu, Muralidhar was not in a position to move and was severely beaten, it is difficult to believe that at the relevant time deceased Muralidhar was in fact in a position to make any statement. Firstly, it must be noted that it has not came on record that when

Muralidhar was taken in a bullock-cart near Temple, he was unconscious or was not in a position to speak. So we can not jump to the conclusion that at the relevant time, Muralidhar was in fact not in a position to make a statement. However, considering the fact that Rambhau is an interested witness and other persons who have gathered at the said place have not supported this version. We are not inclined to give much importance to the testimony of witness Rambhau Shelke.

18. Another witness examined by the Prosecution to show that the complainant Balu had made immediate disclosure about name of the assailants is Police Patil Ashok Shelke Exh-20. It must be noted that the said witness has also clearly stated that on that day at about 7.00 pm or so complainant Balu came to his house and told him that his father Muralidhar is beaten by Khandu and his brother and his wife. He, however, did not support the prosecution version that when he accompanied Balu to the place where Muralidhar was kept and made query with Muralidhar, he told him that accused Khandu assaulted him. The prosecution therefore declared this witness as hostile. However, due importance shall have to be given to his statement that at the relevant time complainant Balu had disclosed the

name of present accused as assailant. So, prompt disclosure about the assault made by Khandu also lends support to the prosecution case.

19. It is pertinent to note that prosecution witness NO.6 Dr. Chavan who examined Muralidhar at Primary Health Center Kazi Sangavi at about 8.45 pm and Dr. Sulakhe who examined Muralidhar at Chandwad Hospital have stated that history of assault was given to them when they examined the patient. So, all this evidence clearly indicates that there is no reason to disbelieve the testimony of witness Balu and the defence of the accused that Muralidhar sustained injury due to fall is not at all true and correct.

20. Though an attempt is made on behalf of the defence to show that prosecution has not brought on record the exact place of incident and weapon used in the alleged assault is not produced, there is no much substance in the said argument. Firstly, it must be noted that prosecution has examined the Circle Inspector Pundlik Rakibe Exh-27 and he has stated that the incident in question took place in the land bearing Block No.123, however, it is wrongly mentioned in the map as 130. Besides this, it matters very little

whether the alleged incident has taken place in land bearing Block No.123 or 130 particularly when it is not the case of the accused that at the relevant time, the complainant and his father tried to sow their land and as such in order to protect their land, they assaulted Muralidhar. Similarly, non seizure of the weapon can not be considered to be a very important circumstance in the instant case as there is direct evidence against the present accused. For this proposition useful reference can be made to **AIR 1990 Supreme Court 881**.

21. From the evidence on record, we have no hesitation to hold that the prosecution has proved beyond reasonable doubt that on 18/07/1989 in the evening the accused No.1 Khandu assaulted Muralidhar with wooden log on his chest and stomach and as a result of the same, he sustained injuries mentioned in column Nos. 17,18 and 20 of the Postmortem Report Exh-26. It is also very clear that as a result of the said injury ultimately he died. The question arises whether the accused can be held guilty for having committed the murder of Muralidhar. While considering this aspect it must be borne in mind that this is a case where the accused had not gone to the said place with any particular plan or intention. Even according to the

complainant, when the accused found that complainant and his father were sowing a particular piece of land, the accused obstructed and abused and thereafter, assaulted Muralidhar. So, this is a case where the assault is made on the spur of moment and after sudden quarrel and in the said assault, rib was fractured and ultimately, Muralidhar died. It is true that at the relevant time, Muralidhar was of about 60 years of age. But when we find that even the Doctor has also stated that injury in question was not sufficient in the ordinary course of nature to cause death, we can not hold that accused had an intention to cause death of Muralidhar. Nor we can assume that accused had knowledge that such bodily injury would cause death of Muralidhar. So, considering this aspect and the fact that the instrument used for the assault can not be termed as 'dangerous weapon', we are of the view that the offence committed by the accused falls under section 325 of IPC. In our considered view, the finding recorded by the learned Trial Judge that accused is guilty of the offence punishable under section 302 of IPC is not borne out from the evidence on record and is not legal and correct. It is, therefore, necessary to set aside the same.

22. Having regard to all the facts and circumstances of the case, we pass the following order which will meet the ends of justice.

Appeal is partly allowed.

The order of conviction and sentence passed against the accused for the offence punishable under section 302 of IPC is set aside.

Accused is convicted for the offence punishable under section 325 of IPC and is sentenced to suffer R.I. for 3 years and to pay fine of Rs. 10,000/- in default to suffer R.I. for three months. Fine if deposited 3/4th amount of the same be paid to the complainant.

The accused to surrender within 4 weeks from today failing which the Trial Court to take necessary steps for arrest of the accused and send him to jail to undergo the punishment.

The accused is entitled to get set off for the period of detention undergone by him in connection with this offence as per section 428 of Criminal Procedure Code.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)